Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

AT&T Corporation and Tele-Communications, Inc.	)	
Application for Transfer of Control of Cable	)	
Licenses under Section 310(d) of the	)	CS Docket 98-178
Communications Act of 1934	)	

COMMENTS OF MINDSPRING ENTERPRISES, INC.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

MindSpring is one of the nation's leading Internet Service Providers, with a particular focus on residential and small business customers. The company started as a local Internet Service Provider (ISP) in Atlanta in 1994, and has grown to become regional and now national in scope. MindSpring currently serves over 600,000 customers in 45 states, and employs over 800 people. MindSpring has consistently earned top marks for quality of service and customer satisfaction.

MindSpring and other ISPs are proud to be playing a major role in the information revolution. We are the ones who have driven the commercialization of the Internet by making it widely and easily accessible to consumers. As the world evolves to a packet-switched, "always on" environment for broadband services, ISPs will address consumers' need for assistance with advanced information capabilities by evolving into what might be called "Connectivity Service Providers." They will help consumers connect to and take maximum advantage of high speed, "always on" two-way packet networks so that the full promise of the Internet can be achieved.

MindSpring's comments focus on what we expect is a common goal: preservation of "Open Systems" and competitive choice. We then discuss the role independent ISPs already play in promoting innovation, better services and support, and information diversity. We explain the danger that last mile owners, both incumbent local exchange carriers (ILECs) and cable system operators (cable operators), may instead create a concentrated "Closed System" world by exploiting their control of the physical link to the home or office to deter competition to their own services. Finally, MindSpring urges the Commission to condition approval of the joint

application on the condition that AT&T provide "equal access" to the transport services of its cable loops.

The local connection to the customer, whether provided by an ILEC or a cable operator, has been the historical source of bottleneck market power -- and practical realities dictate that this problem will continue as the two-way local telephone network and one way local cable network convert from circuit-switched narrowband and analog video broadcast to packet-switched broadband. The Commission's challenge here is to ensure that consumers will continue to enjoy a broad diversity of competitive choice and information supply as the Internet and other packet-switched applications mature.

Today the Nation enjoys an "Open Systems" environment for Internet access because consumers can access the service provider of their choice by placing a telephone call, a call that the phone company may not block. As Internet applications increasingly demand higher bandwidth transmission capabilities to realize their full potential, cable modems are becoming a vehicle of choice for consumers seeking high speed access to Internet services. Unlike the phone company, however, a cable operator may limit a consumer's choice of direct access to ISPs.

Because of this regulatory difference, it is by no means inevitable that the "Open System World" we enjoy today, and that we want in the future, will survive the transition to broadband local loops. There is a serious danger that instead consumers will be faced with a "Closed System World," with their service options limited to those offered by (or permitted to be offered by) the owner of the last mile broadband loop.

Unfortunately, the market power of loop owners is likely to increase in a broadband environment because they can more easily discriminate against unaffiliated ISPs and other non-last-mile owners. For at least the next five to ten years (and perhaps indefinitely), the

primary high speed packet connection to homes and small businesses will run over the wireline plant of the ILEC or the cable operator.

MindSpring and other independent ISPs are "Exhibit 1" demonstrating the crucial importance of preserving low entry barriers for innovative new firms in the Internet connectivity market. Unless these low entry barriers also apply with respect to broadband services over cable loops, then it is likely that most residential consumers will be unable to access the ISP – and the resulting innovation, service, and information – of their choice. Equal access must be applied in the public interest to cable as well as ILEC networks. Only then will "all Americans," to use the language of Section 706 of the Telecommunications Act, continue to enjoy technology innovation, service competition, and true information diversity.

MindSpring strongly believes that the Commission should condition its approval of the AT&T/TCI application with the requirement that AT&T must provide equal access to the broadband transmission capabilities of its cable networks. These equal access rules need not be burdensome and could be modeled on what MindSpring has already achieved with a competitive cable operator who is "overbuilding" cable systems in selected southern cities.

The Commission should reject cable industry arguments that Internet access and other advanced services are cable services. The transport of data packets between a customer location and an ISP is certainly not one-way and it is not the provision of a programming service. It is the provision of basic telecommunications which must be offered separately by any local telecommunications service provider, whether they use an ILEC's traditional twisted pair network, coaxial cable network, or any other transmission network.

MindSpring believes that last mile owners that are taking risks and investing in infrastructure such as two-way capable cable plant should reap a generous reward on their

investment. But the way to earn that reward is not through monopoly or duopoly control of the residential telecom markets of the future. By imposing a reasonable equal access requirement as a condition of approving the joint application of AT&T and TCI, the Commission will take a large step forward to assure that those changes lead to more competition and more diversity in services and information, rather than a concentration of power at the local loop.

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In the Matter of

AT&T Corporation and Tele-Communications, Inc. Application for Transfer of Control of Cable Licenses under Section 310(d) of the Communications Act of 1934	))))	CS Docket 98-178

COMMENTS OF MINDSPRING ENTERPRISES, INC.

MindSpring Enterprises, Inc. ("MindSpring") submits its comments here in response to the Cable Services Bureau's Public Notice regarding the above-captioned application (released September 29, 1998).

INTRODUCTION

MindSpring is one of the nation's leading Internet Service Providers, with a particular focus on residential and small business customers. The company started as a local Internet Service Provider (ISP) in Atlanta in 1994, and has grown to become regional and now national in scope. MindSpring currently serves over 600,000 customers in 45 states, and employs over 800 people. MindSpring has consistently earned top marks for quality of service and customer satisfaction. It was named the ISP with the best customer support by *PC World* magazine in December 1997.

MindSpring congratulates the Bureau for its request for public comment on this matter, especially in light of the fact that we are in the early stages of a societal transformation based on the Internet, advances in packet switching technology, and other computer-driven

applications. MindSpring and other ISPs are proud to be playing a major role in this revolution. We are the ones who have driven the commercialization of the Internet by making it widely and easily accessible to consumers.

This role will become even more important in the future. Large corporations will have their own information technology (IT) professionals. But individuals and small businesses will require outside assistance establishing and using the "advanced information capabilities" that the Internet makes possible. These services will be provided over broadband local loops like those that AT&T, through its merger with TCI, will be able to control through the approval of the joint application for transfer of cable licenses that are the subject of this Notice. 1/ ISPs will address consumers' need for assistance with advanced information capabilities by evolving into what might be called "Connectivity Service Providers" (CSPs). They will help consumers connect to and take maximum advantage of high speed, "always on" two-way packet networks so that the full promise of the Internet can be achieved.

Our comments here begin by discussing what we expect is a common goal: preservation of "Open Systems" and competitive choice. We then discuss the role independent ISPs 2/ already play in promoting innovation, better services and support, and information diversity. We explain the danger that last mile owners, both incumbent local exchange carriers (ILECs) and cable system operators (cable operators), may instead create a concentrated "Closed

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1 As AT&T itself states in the Joint Application, "AT&T needs control of a local loop" in order to offer both cable programming, high speed data services (including Internet access), and voice telephony. AT&T Corporation and Tele-Communications, Inc. Application for Transfer of Control of Cable Licenses under Section 310(d) of the Communications Act of 1934 (filed September 14, 1998), p. 40. (Hereinafter "Application").

2/ By "independent ISP" we mean every ISP except those that are affiliated with owners of last mile loops to customer premises.

System" world by exploiting their control of the physical link to the home or office to deter competition to their own services. Finally, MindSpring urges the Commission to condition approval of the joint application on the condition that AT&T provide "equal access" to the transport services of its cable loops. The Commission is already considering what actions it should take with respect to ensuring access to ILEC facilities for both competitive local exchange carriers (CLECs) and ISPs. 3/ The same concerns faced by the Commission in those proceedings are no less present here. These comments focus on the need for complementary action by the Commission with respect to ensuring access to cable transmission facilities, and in particular the cable facilities that are the subject of the joint application by AT&T and TCI.

I. THE COMMUNICATIONS ACT REQUIRES PRESERVATION OF AN "OPEN SYSTEM WORLD" AS THE LAST MILE CHANGES FROM NARROWBAND TO BROADBAND IN BOTH ILEC AND CABLE NETWORKS.

MindSpring strongly believes that the Commission, acting through the Bureau, should condition its approval of the AT&T/TCI application with the requirement that AT&T must provide equal access to the broadband transmission capabilities of its cable networks, at least to the extent that such facilities are used to provide the transmission of voice or data services. 4/ As the Commission itself recognized in requiring "equal access" as a condition of the provision of enhanced services by AT&T and the Bell Operating Companies using the wireline telephone network, "the basic network is a unique national resource, and our policies

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3 Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188 (released Aug. 7, 1998)("Wireline Services NPRM")

4 AT&T makes clear in the Application that it plans to provide such services customers. What is not clear is whether they will make such capacity available to unaffiliated providers of such services, or only to themselves and their affiliates. See Application, pp. 40-42.

have been designed to promote non-discriminatory utilization of that resource's capabilities." 5/ As discussed in detail below, the same rationale applies equally with respect to the broadband transmission capabilities of a cable network. Both are bottleneck facilities that can be used by the facility owner to thwart the clear public interest goal of maximizing the availability of competitive information services to the public.

The local connection to the customer, whether provided by an ILEC or a cable operator, has been the historical source of bottleneck market power -- and practical realities dictate that this problem will continue as the two-way local telephone network and one way local cable network convert from circuit-switched narrowband and analog video broadcast to packet-switched broadband. 6/ The last mile owner will continue to stand between the end user and any party that needs to communicate with that customer.

The Commission's challenge here is to ensure that consumers will continue to enjoy a broad diversity of competitive choice and information supply as the Internet and other packet-switched applications mature. The Internet's exponential growth has resulted from the innovative actions of hundreds of ISPs and other firms. It is these firms, and not the established local telephone and cable companies, who have pioneered the development of practical, efficient, and in particular open systems to connect end users to this new information and communication resource.

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5 104 F.C.C.2d 958 at 1036 (¶ 148).

6 It would appear to MindSpring that many of the two-way switched services that AT&T plans to provide over the TCI cable network do not meet the one-way definition of "cable service" or the closed transmission path definition of a "cable system" under section 602 of the Communications Act (47 U.S.C. 522), and should more properly be considered, at least to the extent of the transmission of voice and data of the user's choosing, to be "telecommunications

MindSpring would expect most parties to share a common vision of how the world should look in the future. In that world many firms would compete vigorously to offer customers their communications, information, monitoring and other packet-switch-based applications and services. Market entry would be relatively simple so that new innovations could be presented and sold to consumers as rapidly as they are developed. This "Open System World" would be largely unregulated because market forces would drive lower prices and better services and support. An "Open System World" also would preserve the information diversity that characterizes the Internet today. Customers could choose among dozens of companies who compete in part based on how they organize, search, filter and present Internet content -- again, with no need for governmental oversight.

One reason the nation enjoys the benefits of "Open Systems" today is that, in a narrowband environment, dial-up access is adequate for most applications. 7/ Consumers can access the service provider of their choice by placing a telephone call, a call that the phone company may not block. As Internet applications increasingly demand higher bandwidth transmission capabilities to realize their full potential, cable modems are becoming a vehicle of choice for consumers seeking high speed access to Internet services. 8/ MindSpring agrees with the thrust of the Commission's recent Notice of Inquiry regarding the deployment of advanced

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services" and "telephone exchange service" subject to section 251 of the Communications Act (47 U.S.C. 251).

7/ This is not to suggest that narrowband dial-up access has been sufficient for all purposes. As modems and other technology has advanced, certain business end users are increasingly willing to purchase higher speed dedicated access to the Internet.

8 So far this year, 19 times more customers leaving MindSpring's service have identified "change to cable modem" as the reason, as opposed to "change to xDSL."

telecommunications capability pursuant to section 706 of the Telecommunications Act 9/ that the nation has a strong interest in the timely deployment of broadband, high speed packet-switched local connections to the nation's homes and offices. We agree that "always on" broadband connections will become the primary local communications offering in the future. Indeed, we expect more and more applications -- including new unimagined applications -- to migrate to this broadband network, eventually totally replacing the circuit switched and cable networks of today.

Unfortunately, however, it is by no means inevitable that the "Open System World" we enjoy today, and that we want in the future, will survive the transition to broadband local loops. There is a serious danger that instead consumers will be faced with a "Closed System World," with their service options limited to those offered by (or permitted to be offered by) the owner of the last mile broadband loop. Such a "Closed System World" would have profoundly negative implications. It would threaten the competition and innovation that have driven Internet and other advances to date -- consumers would pay higher prices and receive inferior service. And a "Closed System World" threatens the very information diversity that the Internet has unleashed. Put simply, the nation should not care how consumers interface with the Internet if they can choose among competing ISPs offering different content, search engines, and controls. But we should care a great deal if one, or two, or even a small handful of firms are the primary gatekeepers to the Internet.

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9 In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996; CC Docket 98-146 (Hereinafter "Section 706 NOI").

An "Open System World" is completely consistent with the express mandates of Section 706 of the Telecommunications Act. Section 706 directly links the deployment of advanced telecommunications capability with the importance of ensuring that such capability advances competitive choice for consumers. 10/ "Advanced telecommunications capability" itself is defined as capability that "*without regard to any transmission media or technology,* enables users to originate and receive high-quality voice, data, graphics, and video telecommunications." 11/ In short, the purpose of Section 706 is to create an environment in which end users (not last mile loop owners) can decide for themselves what applications and what vendors they will access over the next generation telecommunications network.

An "Open Systems World" also is required by Section 230(b) of the Communications Act. That provision affirms a national policy to preserve the vibrant competition in Internet services that exists today:

> It is the policy of the United States to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation. 12/

But this "vibrant competition" has been possible only because last mile owners, whether ILEC or cable operators, have not been able to exercise market power to deny consumers the ability to

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10/ For example, Section 706 of the Telecommunications Act of 1996 asks the Commission to accelerate deployment of advanced telecommunications capability to "all" Americans "by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Pub. L. 104-104, Title VII § 706(b)(emphasis added), 110 Stat. 153, reproduced in notes under 47 U.S.C. § 157 (hereafter cited as § 706).

11/ Id., § 706(c)(1) (emphasis added).

12/ 47 U.S.C 230(b).

reach ISPs on an "Open Systems" basis. With the transition to broadband telecommunications and approval of the above-captioned application without an equal access mandate, that "vibrant competition" may no longer be maintained in the future.

Unfortunately, the market power of loop owners is likely to increase in a broadband environment because they can more easily discriminate against unaffiliated ISPs and other non-last-mile owners. For at least the next five to ten years (and perhaps indefinitely), the primary high speed packet connection to homes and small businesses will run over the wireline plant of the ILEC or the cable operator. While wireless alternatives may exist in the future, they do not exist today. In particular, it remains to be seen whether it is practical to create two-way mass-market broadband wireless alternatives.

We as a society effectively face a choice. Either we rip up neighborhoods to install a new set of wires every time we want to add a new competitor to the market, or we find an efficient way to share the wires that are in place. Just to state the point is to answer it. It is obviously impractical and uneconomic to deploy multiple broadband loops. That is one of the reasons that AT&T sought the merger whose license transfers are the subject of the above captioned application. 13/ So the primary question is how to ensure the continuation of today's "Open System World" when only one or two (or maybe three) broadband loops reach a typical customer premise. The key to approval of this application in the public interest is for the Commission to condition that approval on requirements that ensure that the local broadband capability inherent in the TCI network is shared among all potential service providers -- rather

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13 Application, p. 40.

than become a source of market power blocking consumers from the full benefits of the Internet and other advanced applications. 14/

II. INDEPENDENT ISPS ARE CRUCIAL TO THE FUTURE OF BROADBAND SERVICES AND AN OPEN INTERNET.

MindSpring and other independent ISPs are "Exhibit 1" demonstrating the crucial importance of preserving low entry barriers for innovative new firms in the Internet connectivity market. Only then will "all Americans," to use the language of Section 706 of the Telecommunications Act, continue to enjoy technology innovation, service competition, and true information diversity.

A. Technology Innovation.

The innovative role of independent ISPs cannot be disputed. Put simply, if the nation had to depend upon current last mile owners to bring us commercial access to the Internet, we would still be waiting. The local telephone and cable industry have not been important innovators or leaders in the Internet in any respect. Even now, several years after the revolutionary significance of the Internet to their own future businesses has become apparent, last mile owners remain essentially non-players in the Internet access field. They make many

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14/ If AT&T is able to successfully reach all of TCI's customers (including those reached through affiliated agreements) they would have access to approximately one third of all cable customers nationwide (33 million homes out of 96 million passed by cable). See "FCC Looking at Subscriber Limit Cap;" Multichannel News (No. 27, Volume 19); July 6, 1998; p. 20. Such a market reach is greater than many Bell Operating Companies (BOCs), to which the Commission has already stated will be required to comply with its equal access rules in their provision of advanced services. In that regard, "Open Systems" clearly will be necessary even if one assumes that eventually one or two broadband wireless loops will become technological and economic substitutes for the one or two wireline last mile facilities. It is only incrementally better for three or four last mile owners to stand between customers and advanced services vendors, than for one or two loop owners. Thus, policies to promote open access to last mile facilities will have a continuing vitality for the indefinite future.

announcements for the press, but the reality is that of the total of approximately 25 million Internet access customers, only a small percentage are served by either ILECs or the cable industry. 15/

In short, independent ISPs have lead the explosion in commercial Internet services by creating efficient, easy and economical means for customers, including residential and small business customers, to access the Net. The history of the Internet demonstrates how "Open Systems" in a narrowband world have permitted innovation to flourish.

ISPs and other non-last mile owners will continue to drive new technology and services in the future -- at least provided that they can reach their customers over the new broadband loops on reasonable terms. We can already see new firms exploring Internet telephony that could replace conventional switched network services, and see resistance to these developments by the ILECs. Similarly, content providers are envisioning a future in which they can stream video and audio services to customers over the Internet, sidestepping cable operators who select program options for consumers today. These developments are forcing competitive responses by the established ILEC and cable wireline companies, to the benefit of consumers. But it will be crucial to require "Open System" principles for two-way voice and data transmission over cable networks so that the innovation of the past five years does not come to a grinding halt due to actions by broadband loop owners to close off access to their facilities.

B. Service Competition and Customer Support.

Even leaving aside innovation concerns, customers must continue to enjoy multiple competitive alternatives for connecting to the Internet. Today, thanks to the low entry

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15/ B. Esbin, Internet Over Cable: Defining the Future in Terms of the Past, OPP Working Paper Series No. 30 (August 1998), p. 18.

barriers for ISP service, the market offers customers different options with respect to the key parameters of price, service quality, and ongoing support. MindSpring believes that these areas of product differentiation will become even more important in the future as the capacities of the Internet and packet-switching continue to advance, and as ISPs evolve into CSPs.

MindSpring, for example, has chosen to build its residential and small business products around three core objectives:

1. We specialize in providing customers with an easy start up experience. This includes supplying software that loads well to get customers connected, and an intuitive interface that helps them launch effectively and find things that will be useful for them on the Internet.

2. We invest to ensure that our network is available, reliable and high performance. We maintain sufficient ports and lines so that the customer can be assured of reaching the Internet without blocking problems or other delays.

3. We place a particular priority on ongoing customer support. We realize that our customers are not IT professionals. We add value by helping them take full advantage of the Internet and other packet-switched products.

Other ISPs offer different pricing, different network reliability, and different levels of support. We are not necessarily the cheapest provider, but our success with customers demonstrates that our service mix is very attractive. However, competitive pressures mean that we must always stay on our toes.

As packet-based technology develops, customers will have an even greater interest in a market structure that maximizes both the number of vendors and the competitive pressures on those vendors. They will want vendors who are nimble and creative in helping bring IT applications from the drawing board into the home or office, and then help make sure those applications work easily and reliably. Support already is far more important in our ISP

business than it has been in any telecom business in the past. We are dealing with relatively complex applications, upgrading over time, in a world where the technology building blocks are imperfect. When problems occur, it can be difficult to identify whether the problem lies with the personal computer, modem, phone lines used for data transmission, the Internet itself, or the customer's skills. ISPs such as MindSpring specialize in helping the customer through these issues.

Customer support will become even more complicated and important in the broadband world ahead, as devices and applications over the "Internet" connection expand. In fact, customer support may become the most important piece of economic value added by an ISP/CSP in the residential and small business markets.

MindSpring has discussed customer support in this detail because it is so central to our culture, and because we earn top marks for customer satisfaction in industry surveys. 16/ While we do not want to criticize particular ILECs or cable companies, it is enough to note that their reputations for customer service often are lacking. There is a danger that if customers have to rely on the last mile loop owners for support in operating the new telecom products of the future, those products may be very slow to become available -- especially in the residential and small business markets. At the least, however, customers should have market-driven choices with respect to service options, price, quality and customer support.

C. Information Diversity.

Low entry barriers for independent ISPs also are critical because in the future broadband loops will be the path over which Americans access much of their information

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16/ As noted previously, in December 1997 MindSpring was named the ISP with the best customer support by *PC World* magazine.

content. Today's ISP already is the gateway to the Internet and the customer's first point of contact with the web. The Internet has multiplied information diversity exponentially, with users connecting directly to web sites themselves on a relatively open basis. But already gateway providers have an increasingly active role in this process: through the choice of primary search engines, blocking options and filters (including the selection of the default gateway features), preferential visibility and links for particular web sites, or provisioning of their own content.

This development is positive so long as many ISPs can compete on equal terms for a customer's business. ISPs will be able to position themselves to offer different gateway features and meet different market niches. For example, ISP A might give special visibility to one news source or political viewpoint, while ISP B promotes another and ISP C promotes a third. Or ISP X may offer active and continuously updated filters of certain content classes as the basic default (with those defaults hard for children to change), while ISP B may filter narrowly and ISP C might choose not to block anything. The market can decide which of these diverse options succeed or fail. 17/

However, it is crucial to appreciate that these ISP gateway decisions are inherently editorial in nature, and therefore have potentially profound implications. If a broadband loop owner like AT&T (after approval of this application), with access to roughly one-third of the Nation's households, can exercise power to discriminate against competing ISPs, then information diversity could be threatened. AT&T, like any local loop owner, would have incentives and ability to steer customers to its own gateway, with its own selection of content, blocking defaults and other information-related features. That loop owner therefore may exercise

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17/ This ISP diversity also protects against any one Internet gateway exerting market power over advertisers who want to get special priority in front of customers.

disproportionate power over content matters, advancing its own editorial perspectives and discriminating against unaffiliated ISPs with a different viewpoint.

At the least, the Commission will need to make sure that AT&T does not unilaterally block its customer's access to particular web sites. However, that is not sufficient. The public also may have reason to worry about inherent biases creeping into other content-related decisions related to the Internet gateway. For example, what information sources and points of view receive priority? What information is blocked (or made more difficult to find) by default features, and how easy is it for the typical user to override the defaults? How is the preferred search engine designed? What content does it pull first, and what does it fail to identify at all? What other issues, impossible to anticipate today, may come to the fore in the future?

These are not matters that the government can regulate, nor should it. But the only check on this problem ever becoming serious is to ensure from the beginning that the end user always has an ability to access multiple independent ISPs on reasonable terms and conditions over the same broadband pipe. It is easier to protect the diversity we enjoy today than it would be to address information concentration problems that might otherwise develop in the future. The answer here, as elsewhere, is to preserve an "Open System World" for the use of advanced broadband telecommunications capability.

III. OWNERS OF THE CONNECTION TO THE CUSTOMER HAVE A STRONG INCENTIVE TO FAVOR THEIR OWN AFFILIATED ISP TO THE DETRIMENT OF INDEPENDENT FIRMS.

Absent regulatory requirements to the contrary, experience has proven that the local connection to the customer has always been the historic source of bottleneck monopoly power. Most notoriously, the Bell System abused that power to bar or seriously disadvantage competitors. These practices ultimately resulted in the forced divestiture of the local Bell

operating companies, prohibitions on the BOCs' participation in long distance and other non-local exchange lines of business, and implementation of equal access rules for long distance service use of the local network. 18/

The last mile problem does not end there. More recently the ILEC's control of the wireline loop has been the center of Congressional requirements and ongoing regulatory problems in creating local telephone competition. 19/ Likewise, Congress and the Commission have both had to intervene through local origination and must carry access rules in order to require the cable industry to provide a means for non-affiliated parties to reach consumers with their own programming. 20/ And in the wireless arena, the FCC has found it necessary to require wireless loop operators to make capacity available to unaffiliated vendors in order to promote competition. 21/ In short, ownership of the local connection to the customer conveys market power -- and last mile owners always try to exploit this power to maintain customer control. Loop owners have never shown themselves willing to give competing service vendors reasonable and non-discriminatory access to their facilities (and to the end users served by those facilities) without regulatory intervention.

18/ See United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) ("AT&T Decision").

19/ Many provisions of the Communications Act, and in particular Sections 251 and 252, are aimed at creating access to the local loop so that competition can proceed notwithstanding the ILEC's continuing ownership of that facility. There is no need to review for this Commission all of the continuing issues and problems that have arisen over implementation and enforcement of these provisions.

20/ See, e.g., 47 U.S.C. 531-32, 534.

21/ See, e.g., PCIA, WT Docket No. 98-100, FCC 98-134 (July 2, 1998); Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order, 11 FCC Rcd 18455 (1996), aff'd Cellnet v. FCC, No. 964022 (6th Cir. 1998).

ISPs have been insulated from these problems to date because customers have been able to reach them on a dial-up basis over today's circuit-switched network. 22/ But such access will not be adequate as telecommunications evolves to "always on" packet-switched technology. Cable operators and ILECs are beginning to offer end users Internet access along with other services, and will not have an incentive to cooperate with competing ISPs. 23/ There are many ways that they potentially could deny independent ISPs the practical ability to serve end user customers. Some loop owners may simply refuse to connect with unaffiliated ISPs. Others may offer to do so in principle, but charge unreasonable interconnection or transport fees that bear no relationship to their costs. Discrimination also could occur in the relative speed with which customers are connected to ISP vs. affiliated Internet access services, in the use of customer information for marketing (such as loop owner use of customer data to support "win back" marketing when a customer chooses an independent ISP), and other factors. 24/

The danger for consumers is that their choices for ISP could concentrate down to the very small number of companies operating broadband local loops to their home or office location. AT &T is clearly seeking to be one of the companies, as are the ILECs. At some point in the more distant future there may be a third last mile facility in certain locations. But it is

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22/ Similarly, regulatory rules today prevent ILECs from refusing to sell dedicated access between a large business location and an ISP.

23 Indeed, at the Commission's October 22, 1998, en banc panel on mergers, a representative of TCI refused in response to questions to make any commitment with respect to direct customer access over TCI's cable system to independent ISPs.

24/ The Commission is familiar with these and other areas of potential discrimination from its activities to promote telecommunications competition in the past. The ILECs already have demonstrated in one form or another most of the ways that they can exploit their control of the local loop to favor their own services and discriminate against competitors. The only issue is how those problems will arise as both cable and telephone loops become broadband.

simply not conceivable that the number of loop owners will approach the number of ISPs that consumers can select among today.

In the end, then, customers could end up with as few as one broadband option for ISP service, and at most only as many ISP options as there are broadband loop owners positioned to serve their premise. Even if ISPs affiliated with those broadband loop owners did not block their customers from reaching any particular web site, including web sites offered by other ISPs, there is no reason that consumers should have to sign up with – and pay for – two ISPs to get the customer service, innovation, and information diversity that they want.

Consumers would be denied the benefits of innovation and competition, including competition in support services, that they enjoy today. And the nation would face new information diversity issues to the extent that this single loop owner, and perhaps its one or two competitors, had disproportionate control over the gateways to the Internet. This result would deny the potential of the Internet, and violate the pro-competitive statutory mandates of numerous sections of the Communications Act and Telecommunications Act.

IV. THE COMMISSION SHOULD REQUIRE EQUAL ACCESS AS A CONDITION OF APPROVING THE LICENSE TRANSFER IN ORDER TO PRESERVE LOW ENTRY BARRIERS AND MAXIMIZE CONSUMER ISP OPTIONS.

MindSpring urges the Commission to maintain its long held "Open System" goals by requiring AT&T to sell broadband transport capacity provided over its cable loops for connecting an end user premise to any ISP on an equal access-type basis. Customers should be able to reach the ISP of their choice, with no discrimination on the part of the loop owner in favor of its own ISP affiliate.

A. Equal Access Reflects Competitive Market Behavior.

Any suggestion that the imposition of an equal access requirement is somehow burdensome or unnecessary due to competition in the broadband services market should be summarily rejected. 25/ A duopoly, if one even existed, between AT&T (or any cable operator) and an ILEC that controls broadband access to the consumer with respect to the provision of broadband access to information services is no better than a monopoly, and certainly does not serve the public's interest in maintaining open, competitive access to the ISP of their choice, using the technology of their choice. AT&T and TCI both have the experience and resources to be able to efficiently deal with Commission rules regarding equal access. All those rules do is ensure that they will behave as they would in a competitive market. When one does in fact exist – which unfortunately will likely not be in the near future – then the Commission may always revisit the need for such a requirement, and forbear from applying it as appropriate. 26/

These equal access rules need not be burdensome and could be modeled on what MindSpring has already achieved with a competitive cable operator who is "overbuilding" cable systems in selected southern cities. In this competitive overbuild environment, which only exists in a small number of cities today, the competitive cable company seeks out others to share the risk and utilize their capacity – something that is strikingly absent from the approach taken by the ILECs and incumbent cable operators like TCI. Under this agreement, MindSpring interconnects with a router at the cable headend, and the cable operator transports data packets over its HFC network to and from our customer's premise. MindSpring supplies and installs customer

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25 See supra, Section I.

premises equipment and provides other end user Internet support. We pay the cable operator to connect to their router on a per customer basis.

Significantly, this kind of transport arrangement can be done on a non-exclusive basis. Various ISPs can attempt to win the customer, and the successful vendor can then use the transport to the customer premise. This agreement could serve as a model for an "equal access" requirement for cable operators, and would still provide the cable operator a good return on their investment.

This approach essentially consists of an unbundling of the consumer's purchase of transport over a cable system from the purchase of ISP services. The consumer may or may not have more than one broadband facility to its premise. If not, it still can reach the ISP of its choice. If so (say both an ILEC wire and a cable wire), the consumer can choose which wire he or she prefers, as well as which ISP to provide services over that wire. 27/

Unfortunately, MindSpring does not anticipate that most last mile companies – and in particular AT&T with the market presence that would come from obtaining all of TCI's licenses – will voluntarily accommodate unaffiliated ISPs in this fashion. Absent regulatory requirements, they may refuse to sell transport -- or else offer transport only on competitively unreasonable terms and conditions. If in fact AT&T does offer transport services to independent ISPs on the same terms and conditions that they would offer to their own ISP affiliate, then an equal access requirement to that effect does them no harm. However, if history is any guide, in

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26/ In this regard, MindSpring supports the Commission's actions to further the competitive provision of advanced services by CLECs. See Mindspring's Comments and Reply Comments in the Wireline Services NPRM.

the absence of such a requirement MindSpring is certain that such selfless (though not unprofitable, as AT&T's experience in the truly competitive interexchange market shows) behavior is not likely to be the case.

B. Two Way Transport of Voice or Data is Not a Cable Service.

MindSpring does not agree with positions taken by the cable industry that Internet services provided over cable systems are cable service, and therefore not subject to any equal access type requirements. The transport provided by a coaxial cable loop is no different from the transport provided by a twisted copper pair or a fiber optic wire. Cable interests attempt to evade this common sense conclusion by arguing that cable Internet activities meet the definition of "cable services" that are regulated by Title VI of the Communications Act rather than Title II. They point to the addition of the words "or use" to that definition in the Telecom Act. 28/ However, this argument is absurd. The definition in section 602 of the Communications Act clearly states that "cable service" is "the one-way transmission to subscribers of video programming or other programming service, and subscriber interaction, if any which is required for the selection or use of such video programming or other programming service." 29/ Internet access is two-way, not one-way, and it is not a programming service. And beyond that, the transport of data packets between a customer location and an ISP is certainly not one-way and it is not the provision of a programming service. It is the provision of basic telecommunications

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27/ It is not necessarily important whether the selected ISP contracts with the last mile owner and pays for the loop to reach the end user, or the end user buys the loop to reach the ISP. Either way the last mile owner would be compensated for the transport it provides.

28/ See, e.g., AT&T Comments on the Section 706 NOI at 37-38; accord, NCTA Comments on the Section 706 NOI at 22-23.

29 47 U.S.C. 522(6) (emphasis added).

which must be offered separately by any local telecommunications service provider, whether they use an ILEC's traditional twisted pair network, coaxial cable network, or any other transmission network.

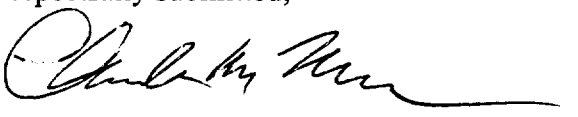
CONCLUSION

MindSpring would like to emphasize that we think the last mile owners that are investing in infrastructure such as two-way capable cable plant should reap a generous reward on their investment. They are taking risk and they deserve reward. But the way to earn that reward is not through monopoly or duopoly control of the residential telecom markets of the future. The societal cost of that is just much too high. The way to earn the reward is to profitably carry last mile traffic for many competitive service providers who will drive overall market development much faster than the last mile owner could ever hope to alone, thereby driving revenue and profit for the network owner.

MindSpring again applauds the Commission, acting through the Bureau, for putting this important issue out for public comment. Many issues related to those Mindspring has discussed here are being considered in the Commission's two proceedings pursuant to Section 706 of the Telecommunications Act. In those proceedings the Commission has recognized that broadband packet technology is likely to cause profound changes to all levels of society. By imposing a reasonable equal access requirement as a condition of approving the above-captioned application, the Commission will take a large step forward to assure that those changes lead to more competition and more diversity in services and information, rather than a concentration of power at the local loop. We are confident that if the Commission places "Open System" goals first, it will promote the public interest and succeed in meeting the mandate of Section 706 of the Telecommunications Act to promote competition in the provision of

broadband services for "all Americans." To approve this application without such a condition would be to start down a path that will not result in a vibrant and competitive free market for the Internet and the many existing and yet unimagined services that it can provide.

Respectfully submitted,



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